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THE HARTER ACT.

IT is nearly ten years since Congress by a statute commonly known as the Harter Act[1] made a fundamental change in the obligation of carriers by sea. The act has been the subject of many adjudications in the federal courts, and it is now possible with a fair degree of certainty to state its most important effects, and to define the limits of the changes it has made. It is remarkable both in substance and in form. While its results have caused

[1] 2 Supp. Rev. St., p. 81; 27 U. S. St., p. 445.

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

it to be described as "a novelty in maritime legislation," its wording has led to its characterization as "inscrutable." Strangely enough, it exonerates the carrier, in many cases, from liability for neglect of servants, and yet leaves him, for the most part, under his former strict responsibility for accidental loss. Actions for cargo damage now sometimes present the curious spectacle of a defendant trying to prove that the loss happened by his fault, and a plaintiff insisting that it was wholly an accident. In such a contest the defendant often has an advantage.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

SEC. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

SEC. 7. Sections one and four of this act shall not apply to the transportation of live animals.

SEC. 8. That this act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

Approved, February 13, 1893.

The modifications which the bill underwent in its passage through Congress are significant, and throw some light upon its structure. Its main purpose, as was said in debate, was to break up the practice by which owners of ships engaged in foreign trade inserted in bills of lading clauses which purported to relieve them from liability for injuries due to neglect of agents. Such clauses, though held invalid in the federal courts, in the case of common carriers at least, were enforced in countries to which the vessels were bound, as well as in the courts of some states; and, in any case, a shipper finding such a clause in his bill of lading might suppose it valid. The bill[1] accordingly declared unlawful the insertion of such clauses, or of any clause impairing the shipowner's obligation to make his vessel seaworthy. As if by way of compensation, it then provided that if the vessel was seaworthy, there should be no liability for error of judgment in her navigation or management, if she were navigated with due care. But in the form in which the bill was passed, its prohibitions were considerably cut down, and its exemptions were greatly extended. The exemptions were made applicable to vessels engaged in domestic as well as to those engaged in foreign trade, and gave relief from the consequences of fault in navigation or management of the ship as well as from the consequences of error in judgment. At the same time the right to exemption was made to depend, not on seaworthiness, but on the exercise by the owner of due diligence to make seaworthy.

Agreements relating to Negligence.

Sections one and two of the Harter Act declare unlawful agreements in a contract for the carriage by water of goods to be exported from or imported into the United States, which purport to relieve the carrier from liability for negligence of agents generally, or for negligence in the loading, stowage, custody, care, or proper delivery of cargo, or for negligence in equipping, manning, provisioning, outfitting, or otherwise making the vessel seaworthy. It seems to follow that such agreements are unenforcible, not only in the federal courts, but in the courts of all the states, whether the vessel be a common carrier or a private carrier. It is not necessary that the agreement specify negligence. If it appears from its terms that it may cover a case

[1] P. R. 9176.

of negligence, it is unenforcible as applied to such a case.[1] Otherwise the statute might be evaded by changing the language of the agreement and broadening its scope. The sections apply to a contract made in a foreign country, so far as to render it unenforcible here. It makes no difference that the stipulation is valid in the country where it was made, or where the goods are to be delivered; for though it may in some cases be the law of the United States that the rights of parties to a contract should be determined by the application of the rules of law prevailing where the contract was made, or was to be performed, there can be no application of foreign law where a domestic statute prescribes the rule to be applied.[2] And it does not matter that the exemption is only conditional (at least if it is of the kind mentioned in section two), and that the shipper by performing the condition can easily prevent its taking effect. For section two declares unlawful all stipulations by which the duty to take care, in the respects therein enumerated, "shall in any wise be lessened, weakened, or avoided." Consequently an agreement that a carrier shall not be liable for goods, unless their value is stated in the bill of lading, is void as applied to a loss due to negligence in stowage and delivery, because it weakens or lessens the obligation to take due care which exists whether the value is mentioned in the bill of lading or not.[3] But the act does not affect a stipulation limiting liability to an amount fairly agreed upon as the value of the goods,[4] for such a stipulation does not attempt to alter the legal relation of the parties. It only settles a question of fact.

Scope of the Exemptions.

The section which has oftenest brought the Harter Act before the courts is section three. This section provides that if the owner has exercised due diligence to make his vessel "in all respects seaworthy and properly manned, equipped, and supplied," neither owner, vessel, nor charterer shall be held "responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," nor for losses arising from other enumer-

[1] Calderon *v.* Atlas Steamship Co., 170 U. S. 272.
[2] Knott *v.* Botany Mills, 179 U. S. 69.
[3] Calderon *v.* Atlas Steamship Co., 170 U. S. 272.
[4] Ibid.

ated causes, including dangers of the sea. For many of these causes, however, the carrier was not liable even before the act.

The section, literally interpreted, would be revolutionary. It would practically wipe out the law of marine collision. But it must be construed in connection with the other sections of the act, and confined to the subject with which the rest of the act is concerned, — the responsibility of a carrier to the owner of the cargo he carries for damage to such cargo. Accordingly it has been said that the act "merely gives a statutory bill of lading."[1] It does not relieve a shipowner from liability for damage to another vessel with which his ship collides through fault in navigation.[2] Nor for damage to cargo on the other vessel.[3] And as, in terms, it applies only to vessels that carry "merchandise or property," so it applies only to the property that such vessels carry and does not relieve the owner from liability for injuries to passengers.[4]

It has also been held that the act does not apply to injury to passengers' baggage;[5] but it is worth noting that in The Kensington[6] the Supreme Court of the United States went a long way around in order to avoid deciding this question.

The exemptions of the act are of broader application than its prohibitions. They are not confined to foreign, nor even to interstate commerce, but apply wherever goods enter or leave a port of the United States. They apply even to vessels which run exclusively between ports of the same state.[7] Foreign as well as domestic vessels are entitled to their benefits,[8] even though the contract of carriage is made in a foreign country.[9]

Faults or Errors in Navigation or in Management.

The most important of the exemptions is that which relates to damage resulting from fault or error in navigation or in the

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[1] Putnam, J., in The Chattahoochee, 74 Fed. Rep. 899 (C. C. A.).

[2] The Delaware, 161 U. S. 459.

[3] The Chattahoochee, 173 U. S. 540, 555.

[4] The Rosedale, 88 Fed. Rep. 324; Moses *v.* Hamburg-American Packet Co., 88 Fed. Rep. 329; *In re* California Navigation and Improvement Co., 110 Fed. Rep. 678.

[5] The Rosedale, *supra*; *In re* California Navigation and Improvement Co., *supra*.

[6] 183 U. S. 263.

[7] *In re* Piper Aden Goodall Co., 86 Fed. Rep. 670.

[8] The Silvia, 171 U. S. 462; The Chattahoochee, 173 U. S. 540; per Mr. Justice Brown at pp. 550–51.

[9] Knott *v.* Botany Mills, 179 U. S. 69, *semble*.

management of the vessel. The word "fault" imports negligence; "error" covers a mistake of judgment that does not amount to negligence.[1]

What is included under navigation or the management of the vessel? This has been discussed in many cases. It is to be noted that the relief which the Harter Act grants in respect to fault in management of the vessel is preceded by a prohibition against contracting for relief from fault in "the loading, stowage, custody, care, or proper delivery" of cargo. Hence it is generally assumed that the two classes of fault are mutually exclusive, so that nothing is fault in the management of the vessel, which is fault in stowage or care of cargo. No doubt this is true; and yet, in determining whether a fault is within the exempted class, it is as important to consider whether it is not management of the vessel, as whether it is care of cargo. Management is at least as specific as care, and the question at issue is whether the fault is a fault of management. Yet it is generally inexactly stated as being the question whether the fault is in stowage or care of cargo; and cases are sometimes decided against the vessel, because the fault seems to be a failure in care of cargo, without a considered determination that it is not a fault in management.[2] The object of the navigation of the vessel is the safe transportation of her cargo. The exemption of fault in management or navigation relates, as has been said, to liability for damage to cargo. But so far as concerns such liability, every fault in navigation or in management is a fault simply because it is likely to interfere with the safe transportation of the cargo. In some sense, then, every such fault is a fault in care of cargo, and cases may arise in which it is hard to tell whether the fault which has caused the loss is a fault in management of vessel, for the consequences of which the carrier is relieved, or is a fault in care of cargo, from the consequences of which he is forbidden to exonerate himself even by agreement.

It is clear that a wrong manœuvre leading to collision is a fault

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[1] The Guadeloupe, 92 Fed. Rep. 670. In The Manitoba, 104 Fed. Rep. 145, 154, it was said that "running upon an unknown or uncharted reef would be error in navigation through ignorance though not a fault." But error usually implies unwise choice, or error of judgment. When danger is unsuspected there is no room for choice. There can be no error of judgment where there is no exercise of judgment. If all damage which might have been averted by a different handling of the ship is to be treated as the result of "error," the exemption will cover most cases of accidental loss.

[2] See The Manitoba, 104 Fed. Rep. 145, 158; and Knott *v.* Botany Mills, 179 U. S. 69.

or error in navigation or management within the act.[1] So is the negligent selection, at a port of call, of an improper anchorage.[2] So, it seems, is negligent failure to send a lookout forward when it leads to a collision.[3] And so is failure to close a port upon the approach of rough weather, though the damage to be feared is injury to cargo, not to ship.[4] In such a case, Mr. Justice Gray, for the court, said of the words "navigation and management":

"They might not include stowage of cargo not affecting the fitness of the ship to carry her cargo.[5] But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas."

The same principle of distinction is recognized in the English cases of The Glenlochil,[6] and The Rodney,[7] in which the bills of lading "incorporated" the Harter Act. In The Glenlochil, the negligence occurred in filling a ballast tank at the port of destination in order to stiffen the ship, after her cargo had been partly unloaded. Sir F. H. Jeune, holding the owner exempted, said[8] that the exemption covers "not direct want of care in respect of the cargo," but fault "primarily connected with the navigation or management of the vessel, and not with the cargo"; and drew the line of demarcation[9] between "want of care of cargo, and want of care of vessel indirectly affecting the cargo." In The Rodney, a boatswain, in clearing out for his own convenience a stopped pipe which served to drain the quarters of the crew, negligently knocked a hole in it which admitted water to cargo below. Sir F. H. Jeune considered that the carrier was not responsible, for the reason, that the act which caused the damage was done "in keeping the vessel in her proper condition"; and Gorell Barnes, J., placed the decision on the ground that it was "improper handling of the ship as a ship which affects the safety of the cargo."[10]

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[1] The Albert Dumois, 177 U. S. 240.

[2] The Etona, 64 Fed. Rep. 880.

[3] The Rosedale, 88 Fed. Rep. 324, 328.

[4] The Silvia, 171 U. S. 462.

[5] It has been held in District Courts that the words do not include stowage even when it does affect the fitness of the ship to carry her cargo. The Whitlieburn, 89 Fed. Rep. 526; The Oneida, 108 Fed. Rep. 87.

[6] [1896] P. 10.

[7] [1900] P. 112.

[8] [1896] P. 10, at p. 15.

[9] Ibid. at p. 16.

[10] [1900] P. 112, at p. 117. In Rowson *v.* Atlantic Transport Co., 19 T. L. Rep. 67 (K. B. D., Nov. 19, 1902), the negligent working of a ship's refrigerating apparatus causing damage to cargo was held to be a fault or error in management of the vessel within the provision of the Harter Act.

In accordance with this principle, it is held that the improper using, or testing, or failure to test, pumps, valves, sluices, or sounding-pipes during the voyage is a fault in management although the sole likelihood of damage is to cargo.[1] And it is a fault in management though it occurs after the voyage is over, and some cargo has been discharged.[2]

On the other hand, it had been held in England, before the Harter Act went into effect, that insecure stowage was not a "fault in navigation or management of the vessel" within the exceptions of a bill of lading,[3] and it clearly is not such within the Harter Act.[4] It also seems clear that where a ship takes cargo for several ports, neither a failure to take care that the cargo for each port is so stowed that it will be found on arrival, nor a failure to look at the manifest on arrival to see what cargo is on board, is a fault in navigation or management, since such fault pertains more directly to stowage and delivery of cargo.[5]

It is hard to state in general language, what will constitute direct want of care of cargo, as distinguished from want of care of ship indirectly affecting cargo; but the distinction may be illustrated by the decisions. For example, where the lightening of the vessel by discharge of cargo at an intermediate port produced a trim which was likely to damage and did damage hides loaded and stowed at a prior port, by causing drainage to run upon them from sugar also loaded and stowed at a prior port, it was held that this was not a fault in management, because it was a fault in loading or stowage, and that the ship was liable for the consequences.[6] It is worth noting that here the original stowage was proper and that the subsequent carelessness, though it consisted in a failure to preserve the vessel's trim by filling or emptying ballast-tanks, was considered to be a failure to take care to maintain a condition of proper stowage. Where the damaged cargo is originally properly stowed, but other cargo loaded at an intermediate port is so placed in the vessel as to make her unstable, so

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[1] The Mexican Prince, 82 Fed. Rep. 484; The British King, 89 Fed. Rep. 872; affirmed 92 Fed. Rep 1018; The Sandfield, 92 Fed. Rep. 663; The Ontario, 106 Fed. Rep. 146; The Merida, 107 Fed. Rep. 146; The Rodney [1900], P. 112.

[2] The Glenlochil [1896], P. 10.

[3] The Ferro [1893], P. 38.

[4] The Frey, 92 Fed. Rep. 667; The Palmas, 108 Fed. Rep. 87; The Mississippi, 113 Fed. Rep. 985.

[5] Calderon *v.* Atlas Steamship Co., 170 U. S. 272.

[6] Knott *v.* Botany Mills, 179 U. S. 69.

that she has to put into a port of distress for her own safety, as well as for safety of cargo, it has been held that the case is not within the exemption of fault in management.[1] So, too, an omission before the vessel sails to provide ballast necessary because of the way she is loaded, has been held to be, in effect, a fault in loading, and so not a fault in management.[2]

DILIGENCE TO MAKE SEAWORTHY.

The Harter Act does not, in terms, grant its exemptions absolutely. It says that "if the owner . . . shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied," he shall not be responsible for damage resulting from the causes enumerated. What is the effect of the condition?

In the first place it is settled that it requires more for its fulfillment than personal diligence on the part of the owner. The diligence exacted is diligence in the preparation of the vessel for sea, whether the work of preparation is performed by the owner in person or by his agents,[3] and no doubt, even if it is turned over to contractors, who are not agents.

At first sight, it seems as if there were no rational connection between the exemption granted and the condition attached to it. To say that if a man has exercised due diligence to make his vessel seaworthy, he shall not be responsible for the fault of the sailors in sailing her, seems much like saying that if a man has used care in selecting his cook, he shall not be liable for reckless driving of his coachman. The seeming incongruity has served in part as foundation for the argument that the proviso means that where there has been care to make seaworthy, there shall be no liability for damage due to unseaworthiness; that it reduces the warranty of seaworthiness to a warranty of diligence to make seaworthy; and that the risk of loss from latent defect, existing at the beginning of the voyage, rests on the shipper. In one of the earlier cases, the court expressed its conviction that such was

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[1] The Oneida, 108 Fed. Rep. 87.

[2] The Whitlieburn, 89 Fed. Rep. 526.

[3] International Navigation Co. *v.* Farr and Bailey Mfg. Co., 181 U. S. 218; The Niagara, 84 Fed. Rep. 902; The Phœnicia, 90 Fed. Rep. 117; The Manitoba, 104 Fed. Rep. 145, 159; The Oneida, 108 Fed. Rep. 886; Nord-deutscher Lloyd *v.* Insurance Co. of North America, 110 Fed. Rep. 420, 425; Dobell *v.* Steamship Rossmore Co., Ltd. [1895] 2 Q. B. 408. The Jane Grey, 99 Fed. Rep. 582, is *contra*.

the design of the statute.[1] But the Supreme Court of the United States has held in the case of The Carib Prince [2] that the act does not relieve from the duty of furnishing a seaworthy vessel, and that for damage solely caused by a latent defect, in existence when the voyage began, the carrier is liable, in spite of having used due care. Mr. Justice Brown (dissenting upon another point) said: [3]

"While it is possible that the framers of this act may have intended to exonerate ships from the consequences of unseaworthiness where due diligence has been used to make them seaworthy, it must be conceded that the language of the third section does not express such intent . . ."

If the proviso has no effect upon loss to which unseaworthiness contributes,[4] what effect has it? Suppose the owner fails to have his vessel periodically examined to see if she needs repairs, but by good luck no repairs are needed, and she is seaworthy. He has none the less failed to use diligence to make her so, and it might be contended that he is not entitled to exemption if, by fault in navigation, she runs aground. But the proviso is not so interpreted. If the vessel is in fact seaworthy, the owner is exempt. In the words of Mr. Justice Brown, speaking for the majority of the Supreme Court: [5]

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[1] The Millie R. Bohannon, 64 Fed. Rep. 883, 884.

[2] 170 U. S. 655. See also The Silvia, 171 U. S. 462. To the same effect are Insurance Co. of North America *v.* North German Lloyd Co., 106 Fed. Rep. 973, 975–976; The Aggie, 107 Fed. Rep. 300.

[3] 170 U. S. 655, at p. 664.

[4] In The Manitoba, 104 Fed. Rep. 145, 152–153, the court, relying on words of Mr. Justice Shiras in The Irrawaddy, 171 U. S. 187, 192, seems to express an opinion that damage caused by unseaworthiness concurring with fault in management is damage due to fault in management within the exemption of the act. Under this construction there would be no liability where a defect, latent on sailing, was brought into activity by careless handling of machinery, or other excepted cause, such as a violent storm. But the construction hardly seems warranted. An exemption from liability for damage described by a reference to its cause is usually regarded as an exemption from responsibility for that cause alone. Liability for unseaworthiness remains, and carries with it liability for resulting damage, whether the shipowner is responsible for concurring causes or not. In no case in the Supreme Court which involves seaworthiness is there any intimation that the Harter Act changes in any degree the effect of the assumption upon which the contract of carriage is based, that the vessel is fit for the voyage. The words used by Mr. Justice Shiras were spoken in a case which did not relate to seaworthiness, and are so comprehensive that they can only be interpreted consistently with the decision in The Carib Prince, by supposing them to refer to what the framers of the Harter Act intended to do, not to what they succeeded in doing.

[5] The Chattahoochee, 173 U. S. 540, 550.

" . . . by the third section of the Harter Act, the owner of a seaworthy vessel (and, in the absence of proof to the contrary, a vessel will be presumed to be seaworthy) is no longer responsible, etc."

And in a later case, the court said :[1]

" We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."

It may be remarked in passing that the seeming contradiction between these passages as to the duty of establishing seaworthiness, may be explained by taking the word " proof " to mean " evidence." The result is that while a vessel will be presumed seaworthy in the absence of evidence to the contrary, yet if evidence is given of unseaworthiness contributing to the loss, the owner, if he relies on the fact that his vessel was seaworthy, must establish it by a preponderance of evidence in his favor. It is clear that in the opinion of the court seaworthiness in fact is as good as diligence to make seaworthy.

Suppose, however, that there has been neither seaworthiness nor diligence to make seaworthy, yet that damage results solely from fault in navigation. A steamship has a cracked shaft that will be dangerous in rough weather, but by negligence the crack is not discovered and she is permitted to sail without repair. No rough weather occurs. The steamer crosses the ocean in safety, but negligently comes into collision in the harbor of destination. Is the owner, who would not have been made liable for damage to his cargo by the negligent failure to examine the shaft before sailing, provided it had not been cracked, to be rendered liable by the mere fact that a crack in it existed, although its existence had not the slightest connection with the damage? The proviso is whimsical, if for such an irrelevant accident it excludes the owner from an exemption he would otherwise receive.

No case has been found in which the owner was so excluded. Although the passage last quoted from the opinion of the Supreme Court may seem at first sight to say that he should be excluded, it will appear on examination that it does not say so. It means that if the cause of the loss is a failure to use care to make sea-

[1] International Navigation Co. *v.* Farr and Bailey Mfg. Co., 181 U. S. 218, 226.

worthy, the case is not within the exemption, even though such failure is a fault in management. It does not mean that exemption would be refused for a fault in management, because of a failure to use care to make seaworthy, distinct from the fault in management and not contributing to the loss.

The sole effect of the proviso seems to be that which has just been suggested. When section three says that the owner shall not be liable for fault in navigation or management, provided diligence has been used to make seaworthy, it excludes from fault in management all carelessness in preparing the vessel for the voyage. Under this interpretation, the act is reasonable and consistent, and its language is such as might naturally be used to express its intent. The interpretation is a literal one as well. For the diligence to which the proviso refers, is diligence which it is the carrier's duty to employ. But so far as concerns liability for damage to cargo, his only duty is to avoid such damage, and, if no damage results from his lack of diligence, the carrier is at liberty to be as careless as he pleases. If his lack of diligence does not contribute to the damage, he has used all the diligence that was due, and the proviso is fulfilled. That this is true when the vessel is seaworthy, has already been seen, and it proves that the act is not intended to deprive the owner of exemption, merely because he is careless in equipping his ship. If the carelessness meant by the proviso is not the carelessness which is a breach of moral duty, so as to make the carrier morally blamable, then it ought to be the carelessness which is a breach of legal duty, and makes him legally liable, that is, carelessness which results in damage. It is an argument in favor of this construction that the diligence required is held to be diligence on the part of all for whose conduct the owner is legally liable. If the phrase about due diligence of the owner is used in reference to legal liability as regards the persons who are to exercise it and the work to be done, it would naturally be used in the same sense as regards the occasions on which its exercise is required. In short, it means, it is submitted, that the damage for which exemption is granted, must not be damage resulting from failure to employ that diligence in preparing the vessel for sea upon the exercise of which the act insists. The proviso is inserted only to make it clear that the exoneration granted is in no way to derogate from the obligation to take due care for seaworthiness. It was necessary to insert it because fault in management might otherwise be supposed to include fault in equipping

the vessel for sea. There are English cases in which even the phrase "improper navigation" was held to include such fault.[1]

Application to Cases of General Average.

Does the Harter Act have any application to cases of general average? If the peril which the sacrifice is made to avert, is incurred through fault in navigation, does the act change the ordinary rule which denies to a shipowner a right to receive contribution in average for a sacrifice made to avert a danger threatening the venture, when the danger arises through neglect of his servants? The Supreme Court in The Irrawaddy[2] held, by a divided bench, that the rule was not changed. The decision went upon the ground that the Harter Act does not abrogate the general principle of a shipowner's responsibility for improper navigation; that it only relieves him from responsibility so far as to say that he need not pay damages for cargo lost, but does not relieve him so far as to say that he may receive contribution in average. In other words, the principle of the decision is that the act must be interpreted as meaning only that, in case of improper navigation, the cargo owner shall no longer be entitled to throw upon the shipowner the burden of loss which has fallen upon the cargo. It is silent as to the right of the shipowner to throw upon the owner of cargo any part of the burden of loss which has fallen upon the ship, and hence it confers no such right. As it does not change the rule of law which prohibits contribution, it is immaterial

[1] In The Warkworth, 9 P. D. 145, a collision due to a ship's failure to answer her helm was held to have been caused by improper navigation within the meaning of the English statute for the limitation of shipowners' liability, although the reason of the failure was a defect in the steering-gear caused by the neglect of the shore superintendent, and not discoverable in the ordinary management of the vessel after sailing.

In Carmichael *v.* Liverpool Sailing Ship Owners Assn., 19 Q. B. D. 242, a negligent failure to secure a port while loading cargo, which led to damage upon the voyage, was held to be improper navigation within the meaning of articles of mutual assurance against liability. Lord Esher said (at p. 248): "If something is negligently done or omitted to be done before the navigation of the ship begins, which has an effect on her navigation while she is being navigated, is that or is that not improper navigation within the meaning of these words?" And he considered it "a very sound answer" to say, "Certainly [it is], if that negligence affected the safe sailing of the ship with regard to the safety of the goods on board during the voyage." That this interpretation did not depend upon the character of the instrument in which the words were found, appears from his statement, in Canada Shipping Company *v.* British Shipowners Assn., 23 Q. B. D. 342, 343, that it was an interpretation according to the ordinary meaning of the words.

[2] The Irrawaddy (Flint *v.* Chrystall), 171 U. S. 187.

whether or not it takes away the reason upon which that rule was originally founded.

The decision seems correct, even upon this narrow ground; but it would appear that it might also have been put upon the ground that the right to average contribution is an equitable right, existing only where a loss has fallen upon one which ought in fairness to be shared by others; that where a man, who by the fault of himself or of his servants has brought the property of others into a position of peril, succeeds by his own efforts and at his own expense in averting the peril, he has done no more than he ought to do, and there is no unfairness in making him stand the loss. It was not deemed unfair before the Harter Act to make him stand it, as is clear from the fact that it was then thought proper to make him liable for the damage which happened to the cargo as well as for that which fell upon himself. If it was not unfair before the act, it is not unfair after it; and no equitable ground for contribution exists. The statute does not alter the relation in fact which exists between the owner and his servants. It does not alter the legal consequences which spring from that relation, except in so far as it prescribes that they shall be altered. It does not create an equitable ground for contribution, nor does it, under any ordinary construction, prescribe that contribution shall take place, in spite of the absence of any equity as between the parties which requires it.[1]

Whether a grant of a right to contribution ought to accompany the exemption from liability, is a matter for the legislature. It may strongly be urged that it ought to do so. For as the law

[1] In England, a provision in a contract of carriage that the owner shall not be responsible for neglect of servants is held to enable the owner to maintain an action for contribution in general average for sacrifices made to avert a peril caused by neglect of servants. The provision is said to make the neglect foreign to the owner. This was decided in the recent case in the Court of Appeal, of Milburn *v.* Jamaica Fruit Importing Co. [1900], 2 Q. B. 540, following The Carron Park, 15 P. D. 203. Vaughan Williams, J., dissented in an able opinion. The Irrawaddy was nowhere noticed. While a contract will not necessarily receive the same construction as a statute, it seems probable that if the question should arise under a clause in a bill of lading the federal courts would follow the doctrine of The Irrawaddy. For the Dutch law, see The Mary Thomas [1894], P. 108. For the French law, see Hick *v.* London Assurance, 1 Com. Cas. 244. The case of Le Normand *v.* Compagnie Générale Transatlantique, 1 Dalloz, Jurisprudence Générale, 479, to which Mr. Justice Brown refers in his dissenting opinion in The Irrawaddy, as showing the law of France, seems to have concerned the right to contribution for payment of salvage which constituted a lien on the cargo, and so not to be inconsistent, in its decision at least, with The Irrawaddy.

stands, the shipowner in a case, say, of negligent stranding, is not responsible for loss of cargo, nor for failure to make voluntary sacrifices to save it; and yet, if he makes such sacrifices, they are, in general, at his own cost. It may be to his interest to let the cargo perish. So far as the law of general average is needed in order to encourage sacrifice and to protect owners of cargo, it is needed in such a case. The Harter Act, in the cases which it covers, in effect deprives the cargo-owner of the protection of the maritime law of general average, as regards sacrifices made by the owner of the ship.

It is to be noted that in The Irrawaddy it appears that the shipowner had paid salvage charges against the cargo, and that for so much of his claim as arose from the payment of salvage, his right to reimbursement was not disputed, and was not before the court. The principle of the decision would not prevent such reimbursement. It would not prevent the shipowner's recovering a sum paid with authority, implied in fact, from the owner of cargo, or paid to discharge a lien that had already attached to the cargo. For when the lien attaches, the cargo-owner loses a beneficial interest in the property, corresponding to what the lienor gains, and for this loss the shipowner is not liable. When, therefore, the shipowner, acting not officiously, discharges the lien, he is entitled under the principles of quasi-contract to reimbursement to the amount of the benefit conferred. The owners of cargo, though not liable for payments made to avert losses that did not happen, should be liable for payments made in discharge of existing claims against them or their cargo.

Application to Cases of Collision.

In cases of collision where both vessels are to blame the effect of the Harter Act has proved a matter of some difficulty and doubt. Before the act, the owner of cargo could recover all his damage from either vessel; [1] but if both vessels were before the court, he must first try to get half from each.[2] As between the vessels, the total damage was equally divided. The one which suffered most was allowed a claim for one-half the excess of her damage over the damage to the other; but if the other had paid more than the first for damage to cargo carried on either ship,

[1] The Atlas, 93 U. S. 302.

[2] The Alabama and The Gamecock, 92 U. S. 695.

the amount so paid in excess was counted as a part of her own loss, and she was entitled to recoup one-half of it, in diminution of the claim against her.[1] What, if any, changes has the act produced? May the claim of a vessel carrying cargo be diminished by recoupment against her for damage to her cargo which the other vessel has paid, or would that be to make her responsible for damage to her cargo within the act? If the claim arising from payment of cargo damage may be urged in recoupment, may it also be pressed beyond the point at which it extinguishes the claim in favor of the carrying vessel, and made the basis of a claim against her? May she thus be not merely precluded from receiving compensation for her own injuries, but made to contribute to the payment of cargo damage by the other ship? And finally, if the owner of the non-carrying vessel takes advantage of the statute which limits the liability of a shipowner to the value of his ship and freight, as they exist at the end of the voyage, and if this value is insufficient to satisfy all claims, is the cargo to retain the preference which was accorded it before the Harter Act, or does the exoneration which the act confers, admit the carrier to claim upon an equal footing with the cargo?

In the case of The Chattahoochee,[2] where a laden schooner was run down by a steamship, it was settled that when the carrying vessel suffers most in the collision, its claim for one-half the excess of its damages may be diminished by recoupment of one-half the damages to cargo for which the other vessel has to pay. Moreover, upon the principle of that case and of authorities approved in it, it seems probable that the claim of the non-carrying vessel for cargo damage paid should be allowed even beyond the point at which it extinguishes the claim of the carrier; and that when, including as part of its loss, the damage to cargo for which it is held liable, the non-carrying vessel has suffered more than the other ship, it should be permitted to recover one-half the excess of its loss. The theory of such a decision would be that to hold the carrying ship so liable by reason of the fact

[1] The North Star, 106 U. S. 17; The Chattahoochee, 173 U. S. 540; The Albert Dumois, 177 U. S. 240.

[2] 173 U. S. 540. The theory that this case was decided on the ground that the same persons sued as owners of the carrying vessel and as bailees of her cargo is disposed of, if not by the language of the decision itself, at any rate by what is said about it in The Albert Dumois, 177 U. S. 240. It must be taken to overrule The Viola, 60 Fed. Rep. 296; The Rosedale, 88 Fed. Rep. 324, 328, and much that was said in The Niagara, 77 Fed. Rep. 329, 334–336.

that its lost cargo has been paid for by the other vessel, is not to hold it responsible for the loss of its cargo within the act.

The question depends, in the first place, upon the nature of the liability of one vessel to another for loss by a collision which happens by the fault of both. By the general maritime law, as understood and enforced in American courts (and as enforced in most cases in English courts in substance though not in form[1]) there are no cross-liabilities. There is no obligation on the part of either vessel to pay one-half or any part of the other's damages as such. Indeed, as it would be irrational to require each party to pay the whole of the other's damages, thus merely reversing the burden of loss as it falls; so, to divide each party's loss into two equal parts, and require the other party to pay the whole of one of those parts, would not eliminate the irrationality; it could at most divide it by two. The approved and reasonable view is that which makes the liability arise solely from the equitable principle that a loss due to the fault of both parties ought to be shared between them, and upon this principle regards it as an average loss — a loss on joint account. Upon this view the loss is apportioned between the parties in equal shares without undertaking to ascertain their relative degree of fault, and either party who, through injury to his own property or by paying damages to others, has borne more than half the total burden, has a right to contribution in respect to the excess for such sum as is necessary to make the burden equal, and no other right.[2]

The leading case is The North Star.[3] That case related to the application of the act for limitation of shipowners' liability. The vessel suffering most was a total loss, and under the act her owner was free from all claims. Yet it was held that this did not increase the amount he could recover, which was, as before, one-half the excess of his loss over the loss to the other ship; and that the owner of the other ship, in proving his own damage, and bringing it into the account, so as to reduce the claim against him, was not making the owner of the sunken vessel liable for it. The decision

[1] Stoomvart Maatschappy Nederland *v.* Peninsular and Oriental Steam Navigation Co., 7 App. Cas. 795.

[2] In France and Belgium damages are divided in proportion to fault; in Egypt in proportion to the value of the ships. Gow, Marine Insurance, 249. The total burden to be divided includes damages awarded for loss of cargo or for personal injury or loss of life, even though there is no lien against either ship. The Albert Dumois, 177 U. S. 240.

[3] 106 U. S. 17.

went on the ground that the recoupment permitted was not the offsetting of a cross-claim. Mr. Justice Bradley said: [1]

"According to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden."

Frequently in the opinion, the case is called a case of average. The view of the court is indicated by its comment on the English case of The Montreal.[2] It was there held that a statute which provided that a shipowner should not be "answerable" for the neglect of a pilot employed by compulsion, enabled such shipowner to recover one-half his damages without deduction for damage to the other ship. Of this case, Mr. Justice Bradley disapproved. He said it was contrary to the maritime rule. The criticism demonstrates that in the opinion of the learned judge, the deduction which he thought should have been permitted, was not founded upon a responsibility on the part of the shipowner for damage to the other ship as such, because from all such responsibility he was exempted by the statute.[3] The criticism also assumes the point that in an action for contribution in the nature of average, a statutory exemption from liability for a certain loss does not enable the person in whose favor the exemption is made to exclude it, if it has fallen upon another, from being reckoned among the items to the total of which he must contribute. And this seems sound. For his right is only to recover such proportion of the total loss as it is fair that he should, and the fact that he is not responsible for some of its items, does not alter the fact that another has borne those items of loss so that they form part of the total, nor does it alter the proportion in which, if there is to be contribution, the total loss should be shared, which is equality.

From these considerations the decision in The Chattahoochee follows of necessity. The schooner was not held liable for any

[1] 106 U. S. 22.

[2] 17 Jur. 538; s. c. Eng. L. & E. Rev. 580.

[3] It may be asked why, if the statute does exempt the owner from all responsibility, he should not, on the view of the English courts, get full damages instead of only half damages. In The Hector, 8 P. D. 218, Brett, J., could only answer this by saying that logically he ought to get full damages, but by settled practice he gets only half. The inconsistency of the English rule proceeds from a partial but incomplete recognition of the fact that the liability is founded on the principle of contribution, not on direct responsibility as for tort.

part of the cargo damage. The case was simply that the happening of damage to the cargo of the schooner and the enforcement of the steamer's liability for it, increased the total of loss, and so diminished the amount by which the damage to the schooner exceeded her just share, and to that amount alone had she any claim.

And it also follows, that if the cargo damage paid by the steamer had exceeded the damage to the schooner, and the steamer had attempted not merely to recoup, but to obtain a decree in its own favor for half the excess, it would have been entitled to do so, so far as concerns the Harter Act, unless in such a case the Harter Act abolishes the right of contribution for loss which consists in paying damages for cargo. It was held in The Chattahoochee that, in ascertaining whether the non-carrying vessel had borne its share of the loss, the exoneration of the carrier from liability did not affect the inclusion of cargo damage as a part of the loss to be shared, nor the inclusion of its payment by the other vessel as a part of the share which it had borne. This involves the principle that accountability as between the vessels is independent of the liability of the vessel to its cargo; that the loss to be shared is not that for which both vessels are liable, but that for which both vessels are to blame. If so, it would seem that the carrier was bound to contribute to the loss suffered by the other vessel in paying cargo damage, even though not liable for such damage itself, and that consequently its obligation to contribute is an obligation distinct from and independent of liability for cargo damage, and that its enforcement does not create responsibility for such damage within the Harter Act. The thing contributed to is not the loss to the cargo-owner, but the loss to the owner of the non-carrying ship. The event which determines the right to contribution is the falling of loss upon the owner of such ship. The Harter Act does not give a general right to navigate carelessly. It does not alter the fact that the carrier's carelessness has helped to bring about a loss which has fallen upon the other vessel, nor that the carrier is in fairness bound to share its burden. The liability of the non-carrying vessel for damage to cargo is a part of the burden of her loss. It weighs as heavily upon her owner as does his liability for the cost of repairs. The same reasons that entitle him to contribution for expenses of repair, entitle him to contribution for expenses of discharging liens upon his vessel that have arisen in favor of owners of dam-

aged cargo. The carrier's fault in navigation which concurs to create such liens may well be deemed a breach of duty to the owner of the other ship. The sum paid in contribution is paid as partial indemnity for his loss. It is not paid as damage to cargo.

If the Harter Act abolishes the right to such contribution, it exonerates the carrier only to throw the burden upon the owner of the other ship. The futile injustice of this result, which could not have been intended, so weighed with the court in The Viola,[1] that the learned judge, who there held that the statute prevented even recoupment on account of cargo damage paid, considered that the cargo-owner should be made to bear the loss from which, in his opinion, the carrier was freed. The literal wording of the section exempts ships from liability for all damage to cargo, and it is only by implication that its operation is confined to their own cargoes. The court embraced the opportunity to interpret the section literally, so far as related to such part of the loss. But it is exceedingly curious to make the non-carrying vessel pay half the damages because under one construction of the act she is not exempted, and to relieve her from the other half because under another construction she is exempted entirely.

There is nothing in the opinion of the Supreme Court in the Chattahoochee case inconsistent with the theory that the carrier is bound to contribute to the payment of cargo damage by the other vessel. The language of the Circuit Court of Appeals strongly implies that the carrier is so bound. The Harter Act, said Judge Putnam,[2] "merely gives a statutory bill of lading." It "has no proper relation to claims between colliding vessels." The status of such claims is "precisely the same as though the cargo lost had been the lading of a third vessel involved in the collision, but in no way at fault."

The Act does not affect the rule that where the owner of one of the vessels in collision limits his liability to an amount insufficient to pay all claims against him, the claim of non-negligent owners of cargo is preferred to that of the owner of another vessel whose fault contributed to the loss.[3] Except so far as the act frees the carrier from responsibility for negligent navigation, it leaves

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[1] 60 Fed. Rep. 296, 297.

[2] The Chattahoochee, 74 Fed. Rep. 899.

[3] The George W. Roby (Miller *v.* Lakeland Transportation Co.), 111 Fed. Rep. 601. Writ of certiorari was three times applied for and denied. 184 U. S. 698, 699.

him responsible for it. He is no longer bound to pay damages, but he is subject to all other legal consequences of his fault, and must still submit to having his cargo's claim against the other vessel preferred to his own.

If what has been said is correct, then the Harter Act has no effect in collisions where both vessels are to blame, unless the non-carrying vessel is not before the court, or limits its liability to an amount insufficient to pay claims for cargo. In such a case, the cargo-owner must lose his former remedy against the carrying ship.

The exemptions of the Harter Act seem to have no effect except to relieve the shipowner from having to pay the cargo-owner for cargo lost or damaged. This is consistent with the purpose of its framers. Their object was to regulate the relation between shipper and carrier.

Frederick Green.